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December 31, 1997

EX PARTE OR LATE FILED

Hon. William Kennard  
Chairman  
Federal Communications Commission  
1919 M Street, NW  
Washington, DC 20554

Ex Parte Letter Re: Cases WT97-197/<sup>197</sup> MM Docket 97-182 & DA96-2140

Dear Chairman Kennard:

I am writing as attorney for and at the request of the Town of Van Buren, New York Planning Board requesting that the FCC terminate all action in the referenced cases, as they attempt to make the FCC the "Federal Zoning Commission" for cellular and broadcast towers in violation of the intent of Congress, the U.S. Constitution and the principles of Federalism.

Congress and the courts have long recognized that zoning is a matter of local concern. In this regard, we respectfully contend that the FCC has little zoning knowledge or expertise and certainly is not readily accessible to most citizens including those residing in the Town of Van Buren.

For these reasons and others, Congress expressly preserved local zoning authority over cellular towers in the 1996 Act. It appears to us that the FCC is now trying to recover this jurisdiction by issuing rules which improperly and unconstitutionally infringe on local zoning authority.

The FCC's efforts to assume jurisdiction over any local zoning matter where RF radiation is mentioned is simply unacceptable to us in Van Buren since such an effort ignores the fact that municipalities cannot always control the statements citizens make during meetings before

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legislative and planning bodies. In fact, many municipalities, by state or local law, are required to allow citizens to speak on any topic they wish, even on items that are not a part of the agenda.

Some of our citizens may well be concerned about radiation from cellular towers, notwithstanding that such concern may be unfounded. For the reasons described, we cannot, and do not wish to, prevent them from mentioning their concerns to us. The FCC's attempt to use this situation as a means to assume zoning authority and reverse local decisions violates basic principles of Federalism, Freedom of Speech and the rights of our citizens to petition their government.

This is particularly true if a municipality expressly says it is not considering such statements and the decision is completely valid on other grounds, such as the impact of the tower on property values or aesthetics.

For similar reasons the FCC cannot and should not "second guess" the reasons for a municipality's decision. The FCC, like the courts, is bound by the stated reasons given by a municipality. Either reasons are sufficient to uphold the decision or they are not. The FCC should not be in a position to "second guess" a municipality's true reasons anymore than the courts can "second guess" the true reasons for the FCC's decisions.

The FCC's proposal to ban moratoria on cellular towers is objectionable for many of the reasons set forth above. It also fails to recognize that for some municipalities moratoria are a well recognized planning and zoning tool, particularly while they review and update their zoning codes. More importantly, Congress took away the FCC's authority over cellular tower zoning, and this includes moratoria.

Similarly, we respectfully request the termination of the FCC's proposed rule making preempting local zoning of broadcast towers. As you know, broadcast towers can be over 2,000 feet high -- frequently, among the tallest structures in a given locality. It is therefore extremely troublesome that the FCC would propose that municipalities cannot consider the impact of such towers on property values, the environment or aesthetics and that even safety considerations take second place. Safety always has to be the first priority.

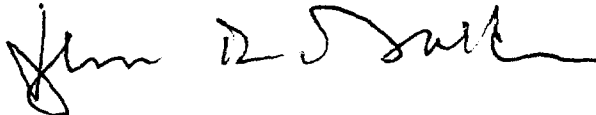
Further, setting artificial time limits for municipalities to act on environmental, zoning and building permit approvals for such towers serves no proper purpose. In fact, we believe it to be a violation of the U.S. Constitution, the Communications Act and Federalism for the FCC to put time limits on municipalities to act on all local approvals and then provide that all such applications will be automatically deemed granted if the municipality doesn't act within this timeframe -- even if the application is incomplete or violates state or local law.

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For the above reasons, we respectfully request that the FCC terminate the referenced proceedings without taking the actions proposed therein.

Respectfully yours,

A handwritten signature in black ink, appearing to read "Dennis R. Baldwin", written in a cursive style.

DRB/ap

Dennis R. Baldwin, Attorney  
Town of Van Buren Planning Board

cc: Elizabeth McCarthy-Bowers, Supervisor, Town of Van Buren  
Anthony J. Geiss, Jr., Chairman, Town of Van Buren Planning Board  
Members of the Planning Board, Town of Van Buren  
William F. Caton  
Hon. Patrick Moynihan  
Hon. Alfonse M. D'Amato  
Hon. James T. Walsh  
Kevin McCarty